

challenge to prisoners' pleas.

Affirmed.

Briefs and Other Related Documents

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United States Court of Appeals,
Tenth Circuit.
Richard L. MILLER, Petitioner-Appellant,
v.
E.J. GALLEGOS, Respondent-Appellee.
Ivon Ernest Yates, Petitioner-Appellant,
v.
E.J. Gallegos, Warden, Respondent-Appellee.
Raymond P. Bates, Petitioner-Appellant,
v.
E.J. Gallegos, Respondent-Appellee.
Robbi Stansberry, Petitioner-Appellant,
v.
E.J. Gallegos, Respondent-Appellee.
Erick Thomas Reddog, Petitioner-Appellant,
v.
E.J. Gallegos, Warden, Respondent-Appellee.
Nos. 04-1117, 04-1118, 04-1119, 04-1120, 04-1141.

Feb. 3, 2005.

Background: Federal prisoners filed habeas petitions challenging validity of Bureau of Prisons (BOP) regulation under which they were denied eligibility for reduction in sentence. The United States District Court denied relief. Prisoners appealed.

Holdings: The Court of Appeals, [Ebel](#), Circuit Judge, held that:

(1) prisoners were assessed for eligibility under final version of regulation and not procedurally questioned interim regulation, and

(2) District Court did not have jurisdiction to hear any

West Headnotes

[1] Habeas Corpus **515**

[197k515 Most Cited Cases](#)

Federal prisoners found ineligible, pursuant to Bureau of Prisons (BOP) regulation governing consideration for early release, for reduction in sentence available to nonviolent offenders who successfully completed residential substance abuse treatment program were assessed under final version of regulation, and not under interim regulation which they questioned on notice and comment grounds, precluding habeas relief; although forms prisoners completed in association with their requests to participate in treatment program referenced interim regulation, the information on the completed forms confirmed that the prisoners' applications were evaluated well after interim regulation became final. [28 C.F.R. § 550.58\(a\)\(1\)](#); [28 U.S.C.A. § 2241](#).

[2] Habeas Corpus **622(2)**

[197k622\(2\) Most Cited Cases](#)

The District Court, which reviewed federal prisoners' habeas petition, challenging validity of Bureau of Prisons (BOP) regulation, did not have jurisdiction to hear any challenge to their pleas, since they were convicted in another federal district. [28 U.S.C.A. § 2241](#); [28 C.F.R. § 550.58\(a\)\(1\)](#).

[3] Habeas Corpus **816**

[197k816 Most Cited Cases](#)

[3] Habeas Corpus **824**

[197k824 Most Cited Cases](#)

Issue of *Blakely v Washington*, which pro se federal prisoners' letter referenced without explanation how it should affect their appeal from denial of habeas petition challenging validity of Bureau of Prisons (BOP) regulation, would not be considered by Court of Appeals, since prisoners did not file motion for post-submission consideration, nor did they seek permission to file brief properly raising *Blakely* issue.

[F.R.A.P. Rule 28\(j\)](#), [28 U.S.C.A.](#); [28 U.S.C.A. § 2241](#).
*935 Richard L. Miller, Seattle, WA, pro se.

[John W. Suthers](#), U.S. Attorney, [James C. Murphy](#),
[Kathleen L. Torres](#), [John M. Hutchins](#), Office of the
United States Attorney, Denver, CO, for
Respondent-Appellee.

Raymond P. Bates, Florence, CO, pro se.

Robbi Stansberry, Florence, CO, pro se.

Erick Thomas Reddog, Florence, CO, pro se.

Before [EBEL](#), [BALDOCK](#), and [KELLY](#), Circuit
Judges.

ORDER AND JUDGMENT [\[FN*\]](#)

[FN*](#) This order and judgment is not binding
precedent, except under the doctrines of law
of the case, res judicata, and collateral
estoppel. The court generally disfavors the
citation of orders and judgments; nevertheless,
an order and judgment may be cited under the
terms and conditions of 10th Cir. R. 36.3.

[EBEL](#), Circuit Judge.

**1 After examining the briefs and appellate records,
this panel has determined unanimously that oral
argument would not materially assist the determination
of these *936 appeals. See [Fed. R.App. P. 34\(a\)\(2\)](#);
10th Cir. R. 34.1(G). The cases are therefore ordered
submitted without oral argument.

Petitioners are federal prisoners found ineligible for a
reduction in sentence available, at the discretion of the
Bureau of Prisons (BOP), to nonviolent offenders who
successfully complete a residential substance abuse
treatment program under [18 U.S.C. § 3621\(e\)](#). [\[FN2\]](#)
They filed these actions, properly deemed habeas
petitions under [28 U.S.C. § 2241](#), to challenge the
validity of the BOP regulation under which they were
denied eligibility. The district court held that though an
interim version may have been invalid under the
Administrative Procedures Act (APA) for

noncompliance with notice and comment procedures,
see [5 U.S.C. § 553](#), the regulation had been properly
finalized before its application to petitioners (none of
whom had entered the program when the final
regulation became effective). The court therefore
denied relief. Petitioners now appeal, and specifically
request that the case be remanded for further
evidentiary proceedings. We deny this request and
affirm.

[FN2](#). The statute provides in relevant part that
"[t]he period a prisoner convicted of a
nonviolent offense remains in custody after
successfully completing a [substance abuse]
treatment program may be reduced by the
Bureau of Prisons, but such reduction may not
be more than one year from the term the
prisoner must otherwise serve." [18 U.S.C. §](#)
[3621\(e\)\(2\)\(B\)](#).

The regulation in question is codified at [28 C.F.R. §](#)
[550.58\(a\)\(1\)](#). The APA issues raised by the manner in
which the interim version of this regulation was
proposed in 1997 are addressed in [Bohner v. Daniels](#),
[243 F.Supp.2d 1171, 1174-77 \(D.Or.2003\)](#), which the
district court relied on in assuming that the interim
regulation was invalid. See also [Lopez v. Davis](#), [531](#)
[U.S. 230, 244 n. 6, 121 S.Ct. 714, 148 L.Ed.2d 635](#)
[\(2001\)](#) (declining to address procedural challenge to
interim regulation based on violation of APA notice and
comment requirements while upholding regulation
against substantive challenge to eligibility exclusions).
We agree with the district court that the APA issues
relating to the interim regulation are not dispositive
here and, therefore, we express no opinion on the
regulation's procedural validity in 1997. As the
government notes, the interim regulation was finalized
on December 22, 2000, see [65 Fed.Reg. 80745](#), and it
is this version that in our view governs the disposition
of these appeals.

In light of the history of [§ 550.58\(a\)\(1\)](#), the district
court appropriately considered "whether an interim
regulation, found invalid for non-compliance with the
advance publication and notice requirements of the
APA, can become valid as a final regulation after the
passage of time and the completion of the comment

period required by the APA." Dist. Ct. Order filed March 11, 2004, at 17-18. The court ultimately concluded that the final version of the regulation (which is the same as the interim version) either "superseded the interim regulation" or at least cured any procedural deficiencies associated with its origination, and "[u]nder either mode of analysis, the application of the BOP regulation to the petitioners after December 2000 is valid." *Id.* at 20.

****2** [\[1\]](#) On appeal, petitioners do not challenge the district court's legal analysis, but focus on what they insist was its erroneous factual assumption that the BOP relied on the finalized version of [§ 550.58\(a\)\(1\)](#) when it found them ineligible for the statutory sentence reduction. They "maintain that they were *in fact* 'designated' by the BOP under the 1997 interim regulation" as shown by "recently obtained documentary evidence from the BOP's own files," and ***937** seek a "limited remand to the district court to afford it the opportunity to reconsider its Order based on the true facts." Combined Motion for Limited Remand with Declarations (Aplt.Br.) [\[FN3\]](#) at 4.

[FN3.](#) By order filed July 13, 2004, this court granted petitioners' request to deem their combined motion for remand as their opening brief. They have submitted no additional briefing on the issues raised by these appeals.

Attached to the financial declarations filed with petitioners' motion for remand are "Notice of Residential Drug Abuse Program Qualification and Provisional [§ 3621\(e\)](#) Eligibility" and "Notification of Instant Offense Determination" forms completed in association with their requests to participate in the residential drug treatment program. These forms are attachments to the BOP program statement dealing with prison drug abuse programs, *see* PS 5330.10 (attachments J & N), which was last modified by a Change Notice issued in conjunction with the interim version of [§ 550.58\(a\)\(1\)](#) in 1997. *See* PS 5330.10, CN-03 (October 9, 1997). The BOP forms continue to reference this most recent revision of the program statement, but that does not mean petitioners' applications were assessed under the procedurally questioned 1997 interim regulation. On the contrary,

the information on the completed forms confirms what the government's affidavits state, that petitioners applied and were put on a waiting list for the drug program at various times in 2002-2003, were notified of their ineligibility for the sentence reduction, and then actually enrolled in 2003--all well after the interim regulation became final. In light of these established facts, which are fully consistent with the district court's unchallenged legal analysis, there is no basis for the requested remand.

[\[2\]](#) Petitioners attempt to buttress their request for remand by asserting that it "would also allow the district court to consider an issue which *should* have been considered when dealing with [their] claims as they are *pro se*," namely, their newly raised allegation that they all pled guilty on the understanding that they would be eligible for a [§ 3621\(e\)](#) sentence reduction and that this expectation has been frustrated by application of the regulation and program statement discussed above. Aplt. Br. at 5. Actually, there are very good reasons why this issue should *not* have been considered in conjunction with the APA objection addressed by the district court. No plea challenge was asserted in petitioners' pleadings, nor did the district judge have any direct knowledge of their underlying criminal proceedings even to suggest such an issue. Indeed, petitioners were all convicted outside the federal district of Colorado and, therefore, any challenge to their pleas would not have fallen within the jurisdiction of the district court. *See Bradshaw v. Story*, [86 F.3d 164, 166 \(10th Cir.1996\)](#) (explaining that in contrast to [§ 2241](#) petition, which concerns execution of sentence and thus "must be filed in the district where the prisoner is confined," [§ 2255](#) motion concerns validity of conviction and sentence and thus "must be filed in the district that imposed the sentence").

****3** [\[3\]](#) Petitioners have submitted a [Fed. R.App. P. 28\(j\)](#) letter citing [Blakely v. Washington](#), --- U.S. ---, [124 S.Ct. 2531, 159 L.Ed.2d 403 \(2004\)](#), which, without further explanation, they state "is far-reach[ing] and should affect the outcome of this action." [F.R.A.P. 28\(j\)](#) Supplementary Authority filed July 20, 2004. They have not, however, filed "a Motion for Post-Submission Consideration, nor did [they] seek permission to file a brief properly raising the *Blakely*

issue," so we need *938 not consider it. [United States v. Lindsey](#), 389 F.3d 1334, 1335 n. 1 (10th Cir.2004). In any event, as *Blakely* concerns procedural requirements regarding a trial court's imposition of sentence, while the instant actions concern BOP directives regarding execution of sentence, the supplemental authority has no relevance here.

Finally, we note that four of the five petitioners have sought leave to appeal in forma pauperis. In light of our discussion above, we conclude that they have failed to demonstrate the existence of a reasoned, non-frivolous argument in law or fact in support of their appeals and, accordingly, we deny them leave to proceed in forma pauperis and dismiss their appeals pursuant to [28 U.S.C. § 1915\(e\)\(2\)\(B\)\(i\)](#). See [Carvalho v. Pugh](#), 177 F.3d 1177, 1179 (10th Cir.1999). Petitioner Bates, however, paid the appellate filing fee in full at the outset, rendering [§ 1915\(e\)\(2\)](#) inapplicable, and therefore in his case "it [is] 'appropriate to affirm the district court's judgment rather than dismiss the appeal.' " [Stafford v. United States](#), 208 F.3d 1177, 1179 n. 4 (10th Cir.2000).

The judgment of the district court is AFFIRMED and appellants' motion for remand is DENIED. The motions for leave to appeal in forma pauperis filed by appellants Miller, Yates, Stansberry, and Reddog are DENIED and their appeals, Nos. 04-1117, 04-1118, 04-1120, and 04-1141, are DISMISSED.

125 Fed.Appx. 934, 2005 WL 256546 (10th Cir.(Colo.))

Briefs and Other Related Documents ([Back to top](#))

• [2004 WL 2084975](#) (Appellate Brief) Appellee's Joint Answer Brief (Aug. 20, 2004)Original Image of this Document with Appendix (PDF)

• [04-1141](#) (Docket)
(Apr. 14, 2004)

• [04-1118](#) (Docket)
(Apr. 01, 2004)

• [04-1119](#) (Docket)
(Apr. 01, 2004)

• [04-1120](#) (Docket)
(Apr. 01, 2004)

• [04-1117](#) (Docket)
(Apr. 01, 2004)

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